Filed 12/30/04 In re S.E. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re S.E., a Person Coming Under the Juvenile Court Law.	
MENDOCINO COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DIANA D., Defendant and Appellant.	A106890 (Mendocino County Super. Ct. No. JVSQ0213176)

Diana D. appeals from a May 24, 2004, order terminating her parental rights and freeing her daughter S.E. for adoption. (Welf. & Inst. Code, § 366.26.[1]) She argues there was not substantial evidence supporting the court's conclusion S. was adoptable. We affirm the order.

FACTS

In June 2002, the Mendocino County Department of Children and Family Services (agency) filed a petition seeking to detain six-year-old S. At that time, S. was living with

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

her mother Diana; her father Donald E.[2] resided in Idaho. The primary basis for detention was Diana's emotional abuse and neglect of S. At the jurisdictional hearing, the court sustained some of the allegations and declared the child a dependent. After a dispositional hearing, the court directed the agency to place the child in foster care and the parents were offered reunification services.

Over the next year, S. was placed with relatives while her parents were given the opportunity to reunify with her. An initial placement with her maternal grandmother failed, and S. was sent to her father in Idaho for about six and a half months. While in her father's care, S. was diagnosed with various psychiatric disorders and received psychotropic medications. She spent eight days in a psychiatric facility after she had a tantrum that lasted three days. At the psychiatric facility, physicians discontinued her psychotropic medications. S. responded well to a single "mild" medication. The hospital observed no aggressive or assaultive behavior, but S. seemed "very needy" and had "extremely poor boundaries." Shortly after S. returned to her father's home, her father requested her removal claiming he could not manage her. The court granted the request, and the father subsequently waived any further reunification services.

S. was then sent to Colorado to live with her maternal grandfather and step grandmother (grandparents), her prospective adoptive parents. Two months later, the agency's caseworker Anita Wilhelmi reported to the court that seven-year-old S. was doing well. "The grandparents have noted some mild temper tantrums, but with loving firmness, solid boundaries and consistency, S.'s behavior has been much better than anticipated. She continues to crave attention and reassurance that she is loved and wanted. . . .The behaviors that were reported while in her father's home have not appeared. It is possible that those behaviors have not surfaced because this is a 'honeymoon phase,' but both the grandparents and the [child's] Colorado therapist . . . do not believe these behaviors will be seen." The agency had assessed and approved the

[2] By its May 24, 2004, order, the juvenile court also terminated Donald's parental rights but he has not appealed from the order.

grandparents' home as an appropriate placement for the child. S.'s psychiatrist stopped all of the child's psychotropic medications. The grandparents reported that without the medication, S. was sleeping better, less impulsive, and more focused. S. told the Colorado caseworker she wanted to live with her grandparents, describing their home "as a place where everything belongs to the whole family." S. also said she wanted to visit, but not live, with her mother. S.'s day care provider reported S. was doing very well. In her opinion, S. was "a typical seven year old and appear[ed] developmentally appropriate." After a status review hearing in August 2003, the court approved S.'s placement with her grandparents in Colorado.

By December 2003, S. had been living with her grandparents for seven months. Wilhelmi reported to the court that S. had "stabilized," was "no longer on any medications," and was doing well at home and at school. Wilhelmi had received three phone messages from S. "asking about her future and where she is going to live. She . . . sounded very agitated and distressed about having to return to her mother," stating she did not want to go back to her mother. S.'s Colorado therapist reported the child was doing "very well and her placement with the grandparents [was] stable and appropriate." In her status report to the court, Whilhelmi recommended termination of Diana's reunification services and the scheduling of a hearing on the child's permanent placement.

At the contested termination hearing on December 23, 2003, S. testified in the court's chambers outside her mother's presence. The child stated she was very happy with her grandparents and she did not want to leave their home. When asked why she did not want to live with her mother, S. replied, "Because I don't think she has control of her actions and I don't think she has enough control over her own things that she needs to have control over." S. was afraid her mother would hurt her again "[b]ecause she doesn't have control, and I don't think she'll ever change it." S. loved her mother and believed her mother loved her. Although S. could forgive her mother for past conduct, the child did not believe her mother would be able to control herself. S.'s testimony was read back in open court. S.'s grandfather testified regarding Diana's telephone conversations with

S. The grandfather confirmed S.'s testimony that the child was very upset after Diana said she had almost choked S.'s cat. When the court asked whether S. was truthful about her relationship with her mother, her grandfather replied, "She is very scared. You don't have to listen to her words; just watch her actions." Diana testified regarding her plans to reunify with S. and her difficulties in arranging to see the child in Colorado.

The court terminated Diana's reunifications services and scheduled a section 366.26 hearing to determine a permanent plan for the child. In support of its ruling, the court noted it "had an opportunity to observe S. while she was testifying in chambers. Mother was able to hear the child's words, but she wasn't able to see how S. looked when she said the words. A minimum of five or six times the child teared up and had to stop and compose herself. She has a great deal of sadness and fear about the prospect of returning to her mother at this time." The court also found it would be detrimental if the child was returned to her mother's care at that time based upon the report of the child's therapist. The court concluded its remarks by noting "it's overwhelming in this record that S. has developed an important and nurturing relationship with her current foster parents, the maternal grandfather and his wife." Diana did not seek review of the court's December 23 order.

Before the section 366.26 hearing, the Adoptions Services Bureau of the California Department of Social Services (state adoptions) submitted an adoption assessment report prepared by Constance Hutterer. Hutterer had not interviewed the child or her grandparents because the parties were in Colorado. But, she had reviewed the "copious documentation in the case, and . . . consulted with" the Colorado caseworker supervising the placement in that state. The Colorado caseworker reported S.'s medical condition was "good," and she was "developmentally, on target," attending second grade, and participating in individual therapy. The grandparents reported to the Colorado caseworker that S. had been stable and behaved appropriately for about five months. But when the court terminated Diana's reunification services in December, the child's mental and emotional status became "turbulent." Colorado caseworker opined S. was "acting out" to test "her grandparents' commitment. [The child's] behaviors [were] not

surprising given her history, but [the conduct] took her grandparents by surprise." The grandparents, however, were "receiving family therapy and educational services to help them better understand and cope with [S.'s] behavior problems and their emotional origins." As to the child's attitude toward placement and adoption, the Colorado caseworker reported S. wished to remain with her grandparents. Hutterer concluded her report by noting "[t]he current relative family has met the needs of the child for many months, but they are unsure of their ability to cope with the acting out triggered by the termination of reunification services. The supervising social worker has developed a program to educate the grandparents about [S.'s] emotional needs and provide them with the support they need to continue parenting her. . . .One difficulty has been the lack of financial assistance for the caregivers." Hutterer asked the court to declare adoption as S.'s permanent plan, but recommended parental rights not be terminated at that time so that the agency could further investigate S.'s situation in Colorado.

At the April 7, 2004, section 366.26 hearing, S.'s counsel reported she had spoken to the grandparents the previous day, and the grandparents wanted the court to know they were dedicated to S. and very interested in adopting her. However, the grandparents were unsure how to proceed with the adoption and whether any financial assistance would be available if S. required extensive care. S.'s counsel also reported: "[S.] herself feels that, . . . this is her home, these are her parents, she wants to be adopted, . . . this is where she wants to be. And she's always made that clear. [¶] Some of the pressure has been taken off . . . her as far as the court proceeding. The grandparents indicated that that is the end of her court appearances . . . and now it's the grandparents' focus and they will deal with the court. And I think taking that pressure off has allowed [S.] to release some of the anxiety that she has felt throughout this." Because there was some uncertainty as to the grandparents' plans to adopt S., the court continued the matter for about one month to permit the social workers to do "some additional investigation into permanent plans for [S.]."

Before the next court hearing, Wilhelmi filed a supplemental report recommending termination of parental rights because it was now likely S. would be

adopted by her grandparents. The change in recommendation was based upon the following information in Hutterer's updated adoption assessment report: "The Colorado [case]worker who supervises [S.'s] placement with the current relative family . . . reports that this family has resolved their concerns about adopting: they now feel they will be able to access resources to continue meeting the needs of the child. . . .[T]he prospective adoptive parents have engaged in therapy with [S.], are in close contact with her school, and have attended parenting classes specifically for parents of children with emotional needs." The grandparents requested S. be psychologically evaluated to assess her need for treatment. However, their commitment to the child was not contingent on this evaluation, diagnosis, or recommendations that might result from the evaluation. Additionally, the grandparents had been provided with adoption application documents, and information about the Adoption Assistance Program and the option of a Post-Adoption Contact Agreement. The grandparents had completed most requirements for an adoption home study, and the Colorado caseworker fully expected to be able to approve the grandparents' adoption application.

At the continued section 366.26 hearing, the court admitted Hutterer's adoption assessment reports without objection. Diana called Hutterer as a witness, but only asked her if she had ever met or spoken with S. on the telephone. Hutterer confirmed she never met or spoke with S. on the telephone. Diana testified regarding her contacts with S. over the past year, her therapy, her current living arrangement, and that she was in the progress of annulling her current marriage.

In support of the agency's recommendation of a permanent plan of adoption, S.'s counsel asked the court to consider "[S.'s] prior statements here in the courtroom and letters to the court that she wants to stay with her grandparents." Diana's counsel opposed a finding her rights should be terminated because S. was likely to be adopted. Her counsel was "very concerned that an adoption social worker will change an opinion on an adoption assessment without having even telephoned the child in question. . . .If we want to hear from [S.], maybe a good place to start would be talking to [S.] as opposed to her social worker supervisor who relays a message from the social worker

who relays a message from the grandparent as to what [S.] has said." In addressing the court on the issue of Diana's bond with S., Diana's counsel argued termination of parental rights was not in S.'s interest, again noting "it is most unfortunate that we are relying so much on reports of what people have said of what people have said and what people have said."

The court rejected the arguments of Diana's counsel, finding by clear and convincing evidence it was likely the child would be adopted. The court explained its decision: "The reason this .26 hearing was continued was . . . the court's concern based on the first report by the adoption social worker that if parental rights were terminated, that the child's current caregivers, the maternal grandfather and step[grand]mother . . . would not be the adoptive family. The child has been moved a lot. It has not been good for her until she got to the placement . . . in Colorado. And I wanted to adopt a permanent plan that would assure the child would have some permanence in a home that has been beneficial to her [w]hether . . . by guardianship or adoption. [¶] The updated report of the social worker does provide evidence that if parental rights were terminated, [S.] could be free to be adopted by the family that is currently caretaking her. [¶] Based on the evidence, the court does not find that [Diana] has maintained regular visitation and contact. It has been intermittent. . . .Also, even with the contact that has occurred, although it is pleasant, it is not such a tight parental child bond that the benefits to [S.] from continuing that relationship with her mother outweigh the benefits to her of being provided with a stable adoptive family." The court issued an order filed on May 24, 2004, in which it terminated the rights of S.'s parents and ordered the child placed for adoption. Diana appeals.

DISCUSSION

We review the juvenile court's finding regarding adoptability to determine whether the record contains substantial evidence from which a reasonable trier of fact could conclude, by clear and convincing evidence, that the child is likely to be adopted. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) However, contrary to Diana's

contention, "[t]he 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] . . .' "[O]n appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation]." (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880.) As a reviewing court, we may not reweigh the evidence when assessing its sufficiency. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

As part of its documentation to the court regarding the adoptability of a child, the agency is required to include "[a] *preliminary assessment* of the eligibility and commitment of any identified prospective adoptive parent." (§ 366.22, subd. (b)(4), italics added.) Section 366.26, subdivision (b), specifically requires the juvenile court to review adoption assessment reports, and indicate it has "*read and considered*" them, along with "*other evidence* that the parties may present," before issuing its decision after the section 366.26 hearing. (Italics added.) "The italicized words imply that the [reports] are not merely to be used as background consideration . . . but may form the basis of the . . . determination itself." (Cf. *In re Malinda S.* (1990) 51 Cal.3d 368, 377-378 [partially superseded by statute on another point] (*Malinda S.*).) "[A]s long as a meaningful opportunity to cross-examine and controvert the contents of the report is afforded, such reports constitute competent evidence upon which a court may base its findings." (*Id.* at p. 379.) Diana makes no argument she was not permitted a meaningful opportunity to cross-examine Hutterer or controvert the contents of her reports. Despite the hearsay and double hearsay statements in Hutterer's reports, the information provided a preliminary assessment of the eligibility and commitment of S.'s prospective adoptive parents. That the reports were prepared by a disinterested party in the course of her professional duty "lend them a degree of reliability and trustworthiness." (*Id*. at p. 377.) "Where, as here, hearsay declarations bear indicia of trustworthiness and reliability, the Legislature may certainly empower the courts to accord such evidence probative weight." (*Id*. at p. 384; § 366.26, subd. (b).)

Diana also complains that neither S. nor her maternal grandfather were present at the section 366.26 hearing to testify. However, section 366.26, subdivision (f)(1), provides, in relevant part, that at a section 366.26 hearing, "[a] child under 10 years of age may not be present in court unless the child or the child's counsel so requests or the court so orders." The record does not contain any evidence S.'s counsel or S. herself asked to be present at the section 366.26 hearings. Additionally, there is no evidence Diana requested a court order directing the appearance of S. or her maternal grandfather in person or by telephone. Diana's trial counsel merely argued it was unfortunate the court had to rely upon S.'s statements as reported by other individuals. However, the court was permitted to rely upon the information in Hutterer's reports and the statements of the child's counsel regarding S.'s thoughts about being adopted by her grandparents. (*Malinda S.*, *supra*, 51 Cal.3d at p. 379.) Moreover, it was Diana's burden to secure the attendance of S. or any other witnesses whose statements appeared in the caseworkers' reports. (*Id.* at p. 383.) There is no evidence Diana requested a continuance for that purpose. Consequently, Diana's contention is not preserved for our review. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820.) In any event, Diana presents no reason for us to conclude a different determination would have resulted had the court heard testimony from S. or her maternal grandfather at the section 366.26 hearings.

We also reject Diana's argument that S.'s emotional problems called into question her adoptability. Diana relies, in part, on reports of S.'s emotional distress before she was placed with her grandparents. Since S.'s placement with her grandparents, her emotional distress has significantly decreased and treated in therapy. The re-appearance of "turbulent" behavior occurred when S. learned she would not be reunited with her mother. S.'s grandparents were initially surprised by the onset of behavioral problems. But, by the time of the continued section 366.26 hearing, they had appropriately addressed the child's behavior by participating in therapy with S., keeping in close contact with her school, and attending classes specifically for parents of children with emotional needs. Additionally, they requested an updated psychiatric evaluation to determine the child's future psychiatric counseling needs. They reconfirmed their

commitment to adopt by resolving the financial ramifications of caring for the child and discussing with the Colorado supervising case worker the legal ramifications of the adoption. The grandparents had completed most of the requirements for an adoption home study, and the Colorado caseworker fully expected to approve their adoption application. A prospective adoptive parent's expressed interest in adopting a child "is evidence that the [child's] age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the [child]." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) S.'s emotional problems did not preclude the juvenile court's finding of adoptability.

Given that S.'s grandparents were willing to adopt her, it was in her best interest to remain in that placement as her permanent adoptive home, and no evidence was offered regarding any legal impediment to the adoption, we see no reason to disturb the juvenile court's determination.

DISPOSITION

The May 24, 2004, order is affirmed.

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Corrigan, J.

We concur:

_____
McGuiness, P.J.

_____
Parrilli, J.